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JOHN T. FEY, Clerk

Supreme Court of the United States

OCTOBER TERM, 1957

No. 437

PRENTISS P. SWIFT, J. A. BECK and RAYMOND COMODOR, Trustees of the Congregation of Jehovah's Witnesses, Bethel Unit,

Appellants,

vs.

BOROUGH OF BETHEL, PENNSYLVANIA, a Municipal Corporation, and HOWARD F. BRENHOLTS,

Appellees.

APPEAL FROM THE SUPERIOR COURT OF PENNSYLVANIA

STATEMENT AS TO JURISDICTION

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BOROUGH OF BETHEL, PENNSYLVANIA, a Municipal Corporation, and HOWARD F. BRENHOLTS,

Appellees.

APPEAL FROM THE SUPERIOR COURT OF PENNSYLVANIA

STATEMENT AS TO JURISDICTION

This is an appeal from the judgment of the Superior Court of Pennsylvania dated March 20, 1957, which holds constitutional an ordinance prohibiting the issuance of a permit to appellants to build a church within the Borough of Bethel located within one-quarter mile of any church, school, public building or place of assembly or that does not provide for specified off-street parking. This jurisdictional statement is submitted to show that this Court has jurisdiction of this appeal and that the questions presented are substantial.

OPINION

The opinion of the Superior Court is reported. (*Appeal of Trustees of Congregation of Jehovah's Witnesses, Bethel Unit*, 183 Pa. Super. 219, 130 A. 2d 240) It is attached to this statement and marked Appendix A, *infra*, at pages 28 to 35.

JURISDICTION

This case involves an appeal from a decision by the Board of Adjustment of the Borough of Bethel, Pennsylvania, made under a zoning ordinance, denying an application for a permit to build church in the Borough. The judgment of affirmance by the Superior Court of the decree of the Allegheny County Court was made and entered on March 20, 1957. Within 45 days thereafter appellants petitioned the Supreme Court of Pennsylvania for an order allowing appeal to it pursuant to 17-190 Purdons Pa. Stat. § 12-1136. That court on May 28, 1957, denied the petition, whereupon the Superior Court's judgment became final. The notice of appeal to this Court was timely filed in the Superior Court on August 12, 1957. (*American Railway Express Co.* v. *Levee*, 263 U. S. 19, 20-21 (1923)) Jurisdiction of this Court to hear and to decide this appeal is granted by 28 U. S. C. § 1257 (2).—*Stratton* v. *Stratton*, 239 U. S. 55 (1915); *Michigan-Wisconsin Pipe Line Co.* v. *Calvert*, 347 U. S. 157, 160 (1954); *Largent* v. *Texas*, 318 U. S. 418 (1943); *Jamison* v. *Texas*, 318 U. S. 413 (1943).

ORDINANCE INVOLVED

Relevant portions of Zoning Ordinance of the Borough of Bethel, No. 70-11-51, read as follows:

> ARTICLE III, DISTRICT CLASSIFICATIONS AND REGULATIONS, SECTION 1, General—In order to designate, regulate and restrict the location of residence, commerce, business, trade and industry and the location of all buildings designed, erected, altered or occupied for

specific uses, the Borough is hereby divided into the following eight (8) Districts hereinafter designated as:

One Family Residential District R-1
One Family Residential District R-2
One Family Residential District R-3
Multiple Family Residential District R-4
Neighborhood - Commercial District C-1.
Commercial District C-2
Manufacturing & Light Industrial District M.L.I.
Public Reservation District P.R.

SECTION 3. One Family Residential District—R-1. Uses-One Family Dwelling; Church; Public or Parochial School (certified by State Board of Education) 1. Farming (5 acres or more). Less than five acres—Garden, Nursery, Horticultural, Greenhouse. (for private use only). 2. Accessory Uses incident to any of the principal uses above listed. . . .

• • •

Areas. Each lot in this District shall comply with the following minimum requirements:

• • •

(8) Off-Street Parking—Church School Auditorium, Stadium and similar places of assembly, one car space (300 sq. ft.) for every 5 seats or fraction thereof.

(9) None of the uses listed in Item 8 above, shall be permitted within ¼ mile of each other.

• • •

ARTICLE IX, BOARD OF ADJUSTMENT, SECTION 1. Creation-Members—A Board of Adjustment is hereby established. The word "Board" when used in this Ordinance shall be construed to mean the Board of Adjustment. The Board will consist of three members to be appointed by the Borough Council. . . .

SECTION 3. Appeals—Appeals to the Board of Adjustment may be taken by any person aggrieved or

by any officer, department board, or bureau of the Borough affected by any decision of the Borough Secretary. Such appeal shall be taken within a reasonable time, as provided by the rules of the Board, by filing with the Borough Secretary, from whom the appeal is taken, and with the Board of Adjustment, a notice of appeal specifying the grounds thereof. The Borough Secretary shall forthwith transmit to the Board all the papers constituting the record upon which the action appealed from was taken.

• • •

SECTION 4. Powers—The Board of Adjustment shall have the following powers: . . . (3) To authorize upon appeal, in specific cases, such variance from the terms of the Ordinance as will not be contrary to the public interest, where, owing to special conditions, a literal enforcement of the provisions of the Ordinance will result in unnecessary hardships and so that the spirit of the Ordinance shall be observed and substantial justice done.

The variations shall apply principally to height and area requirements such as, among others, when topography or other conditions exist which clearly show a hardship would be caused in requiring full compliance with the requirements of the District.

In issuing such exceptions or variations, the Board shall consider whether such acts will tend to affect adversely the use and development of neighboring properties and the general neighborhood in accordance with the Zoning Ordinance. The Board may as a condition of issuing such an exception or variation, require such safeguards and restrictions as will protect the neighborhood and not prevent or impair the future use of the land in accordance with the Zoning Ordinance.

In exercising the above mentioned powers, such

Board may in conformity with the provisions of this Ordinance, revise or affirm, wholly or partly, or may modify the order requirement, decisions, or determination appealed from and may make such order, requirement, decision or determination as ought to be made and to that end shall have all the powers of the Borough Secretary from whom the appeal is taken.

The other material parts appear in the printed record which accompanies this jurisdictional statement.

CONSTITUTIONAL PROVISIONS INVOKED

The First Amendment to the United States Constitution provides:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

Section one of the Fourteenth Amendment to the United States Constitution provides:

> "... No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

QUESTIONS PRESENTED

I.

Where appellants applied for a permit to build and use a church in the Borough of Bethel under the above ordinance which was denied because (1) there were other places of assembly within a distance of one-quarter mile from the

property, (2) there was not adequate compliance with the off-street parking requirements of the ordinance, (3) creation of traffic congestion in the area, and (4) protests of residents against the church, do sections 3 (8) and 3 (9) of Article III of the ordinance, as thus construed and applied, abridge Appellant's right to freedom of religion and assembly contrary to the First and Fourteenth Amendments to the Constitution of the United States guaranteeing such rights?

II.

Where the proof showed that permits to build other churches had been granted under the ordinance without compliance with the off-street parking and the one-quarter-mile limitations but, under the same conditions and circumstances, the administrators of the ordinance refused appellants a permit to build a church, are Sections 3 (8) and 3 (9) of Article III of the ordinance, as thus construed and applied, a denial of appellants' constitutional rights of freedom of religion and assembly contrary to the equal protection clause of the Fourteenth Amendment?

III.

Did the Allegheny County Court commit reversible error in denying appellants the right to prove a denial of equal protection of the laws under and by the ordinance in violation of the Fourteenth Amendment to the federal Constitution by granting permits to build churches without requiring compliance with the one-quarter-mile limitation and thus discriminating against the appellants?

STATEMENT OF THE CASE

Proceedings Had and Rulings Made

Appellants filed a petition for appeal from an order of the Bethel Board of Adjustment made under the above

ordinance with the Allegheny County Court. [R. 3-8][1] Appellee, Howard F. Brenholts, intervened in opposition to the appeal as adjoining property owner. [R. 13-14] The trial court allowed the intervention. [R. 14-15] An order of affirmance was made by that court. [R. 29] An opinion was written containing the reasons for the order together with findings of fact and conclusions of law. [R. 20-29] Exceptions thereto were duly filed by appellants. [R. 29-39] The exceptions were dismissed by an order accompanied also by an opinion. [R. 40-45]

Certiorari was applied for and issued from the Superior Court to the Allegheny County Court. [R. 2-3] The case was briefed and argued, resulting in a judgment of affirmance accompanied by an opinion stating reasons. (*Appeal of Trustees of Congregation of Jehovah's Witnesses, Bethel Unit*, 183 Pa. Super. 219, 130 A. 2d 240) The judgment of affirmance was entered on March 20, 1957. See Appendix C. Application for an order allowing appeal to the Supreme Court of Pennsylvania was timely made within 45 days pursuant to 17-190 Purdons Pa. Stats. § 12-1136. See Docket Entries of Superior Court, Appendix D, page 37, *infra*. The appeal was denied.

Material Facts[2]

Appellants, owners of the property in question as trustees for the Congregation of Jehovah's Witnesses, Bethel Unit, applied to the Borough of Bethel for a permit to build a church. [R. 51] The plans submitted complied with all building specifications, safety requirements and setback regulations of the borough and state. [R. 51, 145] The application was submitted to the borough and referred to the Planning Commission of the borough that recommended the granting of a variance from the restrictions in the ordi-

[1] Nine copies of the printed Record filed in the Superior Court (marked as Appendix B) accompany this Statement as to Jurisdiction to support all the things said in this statement of the case.

[2] Since the constitutional questions here depend upon the application of the ordinance to the facts it is necessary to state the facts fully.

nance. [R. 146] The council of the borough, however, on October 25, 1954, denied the building permit "not on the basis of a church, but on the basis of non-compliance with the ordinance, on the basis of creating additional traffic hazards and on the basis of petition by residents against it." [R. 52-53, 54]

An appeal was taken by the trustees to the Board of Adjustment. [R. 54-57] A hearing was had on November 3, 1954, at which appellants, the borough and the local property owners were represented. [R. 57-58] Evidence was received and testimony given both for and against granting a variance. [R. 58-136] The matter was finally decided by the board on May 18, 1955. [R. 137] Findings of fact and conclusions of law were made. [R. 138-139] A majority opinion by two board members supporting the denial was filed. [R. 140-144] The third board member filed a dissenting opinion, stating that appellants had complied with the spirit of the zoning ordinance. [R. 144-146] At the hearing before the board the facts hereinafter stated were developed by the evidence.

Appellants purchased property in the Borough of Bethel on which to build a church building. This was to provide a place of assembly for a congregation of Jehovah's Witnesses, then forced to meet underground in cramped basement quarters at the home of one member of the church in Bethel. [R. 59, 79-80] Plans for the public building were approved by the state and municipal authorities. [R. 51, 60-61] The property was located 877 feet from the nearest place of public assembly or building, another church. This was 443 feet under the one-quarter mile limit imposed by the ordinance. [R. 48]

The present membership of the church is 40 members but the average attendance ranges from 25 to 28 persons on two days of the week, with only three persons meeting there the remainder of the week. [R. 64-66, 79] Only thirteen persons attending the meetings travel by car with the remainder coming by bus, streetcar or walking. [R. 63, 64, 67,

68] An architect testified that there was off-street parking room at the sides, rear and front of the building with room for 38 automobiles or enough space to accomodate parking for a congregation the size of 190 persons. [R. 102] The off-street parking space was more than twice the needs of the maximum size of the congregation, assuming the church attendance reaches the maximum capacity of 85 persons. The ordinance requires only parking space for 17 cars to accommodate the maximum number. [R. 102] The membership of the church would never exceed 85 persons. The group would be split up when the congregation reached that number. [R. 64]

The property is located in a sparsely populated area of the borough. Two vacant lots adjoin the property on the sides; Crest Way, a public road, is at the rear and the property fronts on Bethel Church Road. [R. 36, 92, 94] That road is heavily traveled. The property in question is located near its intersection with Fort Couch Road, which also carries heavy traffic. [R. 21, 122, 123, 139] At night, however, the time of the weekday meetings, and when the Sunday afternoon meetings are held, the traffic on both of these heavily traveled roads is light. [R. 65-66] The weekly church services consume a period of only 5½ hours each week. [65-66] Automobile traffic to the church may use the rear parking entrance from Crest Way, a lightly traveled road. [R. 92]

No measures, such as reduction of speed by a "slow" sign, the stationing of a policeman or installing a traffic light at the intersection of Bethel Church Road and Fort Couch, had been taken by the borough. [R. 67, 68, 127-128, 135] The Board of Adjustment, moreover, did not require entrance by Crest Way, which is admittedly a lightly traveled road. One witness for the borough at the hearing admitted that would be better measures for the control of traffic than barring a church at the proposed site. [R. 128]

The proof showed that the proposed church building conformed to the neighborhood and would beautify—rather

than change—the surrounding area. [R. 83-84, 94] An expert testified that it would not depreciate the value of surrounding properties. [R. 84] Other testimony was to the same effect. [R. 67, 102, 104] A real estate developer who attempted to buy appellants' property said, however, that property located within 1000 feet would be depressed. But he added that the church would not "materially" affect the property values. [R. 117, 118] The church services to be conducted at the proposed site would be quiet, orderly, and at reasonable times. [R. 65, 66, 108]

When appellants purchased the property they relied upon the usual and customary enforcement of the ordinance at the time not to impose the one-quarter-mile or off-street-parking requirements so as to deny permits to church sites. [R. 69, 70, 100] The record of the Board of Adjustment proceedings contained a finding of a member of the board that "practically no other public place in the Borough of Bethel complies with the terms of the ordinance" on the two above restrictions. [R. 147] There was other evidence to show that churches of other denominations had been permitted to be built within one-quarter mile of other churches or public buildings and the prohibition of the ordinance was not enforced with respect to such churches.

Since the Allegheny County Court, on the appeal, had the power to receive, *de novo*, additional evidence about the discriminatory enforcement of the ordinance testimony, supplementing that considered by the Board of Adjustment, was offered to prove that appellants' rights had been denied by the administration of the ordinance in an unequal manner, contrary to law. [R. 16-19] Exception to the exclusion of the evidence of discrimination was noted. [R. 19-20]

How Federal Questions Raised and Determined

In the appeal from the refusal by the borough council to the Board of Adjustment in grounds 4 and 9 the appellants charged that the ordinance, as it had been construed and applied by the Borough of Bethel was unreasonable,

arbitrary, capricious and discriminatory and in violation of the First and Fourteenth Amendments to the Constitution of the United States. [R. 56-57] The Board of Adjustment dismissed the appeal. [R. 144]

The petition for appeal to the Allegheny County Court in Paragraph 9 states:

> "Petitioners further aver
>
> "(a) That the Ordinance as applied to petitioners is unconstitutional under the 1st and 14th amendments of the United States Constitution and under the Pennsylvania Constitution;
>
> "(b) That the Ordinance abridges petitioners' rights to freedom of assembly and freedom of worship and is contrary to the cherished due process and equal protection clauses of the United States Constitution;
>
> "(c) That the Ordinance as applied to petitioners does not bear a substantial relationship to the police powers, that is, to the health, safety, morals and general welfare of the community;
>
> "(d) That the Ordinance is not uniform in its application and is arbitrary, unreasonable and discriminatory;
>
> "(e) That the action of the Board of Adjustment in denying the application for a permit was arbitrary, capricious, an abuse of discretion and without basis in fact or law. A few months prior to petitioners' application the Borough of Bethel granted a building permit to a church of larger proportions but having an even more restricted area separation. Petitioners aver that the granting of this permit was highly proper in that it advanced religious worship in the community. However, petitioners aver that the denial of their application under more favorable circumstances, simply because petitioners adhere to the view of a minority religious group, is discriminatory and that such discrimination smacks of prejudice.
>
> "(f) The Ordinance as applied to petitioners is

vague and indefinite and fails to set forth a proper and definite standard for its application."

The Allegheny County Court overruled the petition for appeal, dismissed the appeal and affirmed the decision of the Board of Adjustment, without discussing the constitutional questions in the terms stated by appellants. [R. 29] In its opinion the court said "we will decide the question of constitutionality of both sections." [R. 22] The federal questions above specified were also not expressly mentioned in the findings of fact or conclusions of law. [R. 20-29] They were implicitly overruled in conclusions of law numbers 1 and 2, where the court held that the off-street parking requirement of the ordinance was constitutional and that the one-quarter-mile limitation "is a constitutional exercise of the police power." [R. 28]

Appellants excepted to the findings of fact and conclusions of law, among other things, as follows:

> "7. Appellants except to the Court's conclusion of law No. 1, which is as follows:
>
> "'1. The Zoning Ordinance of the Borough of Bethel, Article III, sec. 3(8) requiring off-street parking space at places of assembly is a constitutional exercise of the police power.'
>
> "8. Appellants except to the Court's conclusion of law No. 2, which is as follows:
>
> "'2. The Zoning Ordinance of the Borough of Bethel, Article III, sec. 3(9) requiring a quarter of a mile separation between places of assembly is a constitutional exercise of the police power.'" [R. 31]

Appellants excepted in grounds 38 and 39 because of the refusal of the trial court to conclude, as contended and requested by appellants, that the ordinance, as construed and applied, deprived appellants of freedom of worship and assembly contrary to the First and Fourteenth Amendments to the United States Constitution. [R. 38] The Allegheny

County Court in a supplemental opinion overruled the exceptions and again failed expressly to pass upon the federal constitutional questions in the terms raised by apellants. [R. 40-45][3]

Appellants by exceptions taken in the County Court specifically complained of the denial of each federal constitutional ground raised in this statement before the Superior Court and such appellate court passed upon such grounds stated in the exceptions, discussing them in its opinion. The question of the denial of freedom of assembly and religion contrary to the First and Fourteenth Amendments is discussed in the first 12 paragraphs of the opinion, Appendix A, *infra*, pp. 28-33. The question of discrimination in violation of the equal protection clause is disposed of in paragraphs 13 to 16, *infra*, pp. 33-34. The exceptions and contentions raised on the appeal to the Superior Court that the ordinance violated the federal Constitution [R. 38-39] were overruled by the order and judgment of affirmance, Appendix A, *infra*, at page 35, and Appendix C, *infra*, at page 36. This was sufficient to preserve the federal questions raised on this appeal.—*Schuylkill Trust Co.* v. *Pennsylvania*, 296 U. S. 113, 121-123 (1935); *Erie R. Co.* v. *Purdy*, 185 U. S. 148, 154 (1902).

Each question under the federal Constitution presented in this statement was specifically raised in question number 1 of the questions presented in the petition for appeal duly and timely filed in the Supreme Court of Pennsylvania. There the appellants stated:

"Is Article III, Section 3 (8) and (9) of the zoning ordinance, as applied to appellants, invalid as an unconstitutional prohibition of freedom of religion, freedom of worship, and freedom of assembly, contrary to the First and Fourteenth Amendments to the United States Constitution and

[3] The refusal and failure of the state courts to expressly mention or discuss the specific grounds of unconstitutionality in the language pleaded by appellants does not bar this Court from considering them as stated by appellants. See *International Harvester Co.* v. *Missouri*, 234 U. S. 199, 206-207 (1914); *Erie R. Co.* v. *Purdy*, 185 U. S. 148, 154 (1902); *Schuylkill Trust Co.* v. *Pennsylvania*, 296 U. S. 113, 121-123 (1935).

to Article I, Section 3 of the Pennsylvania Constitution? See the petition in the transcript of the record on file in the office of the Clerk of this Court.

The petition for appeal was denied, which also constituted an exhaustion of state remedies on the federal questions here presented. See Appendix E, *infra*, p. 38.

ALL QUESTIONS RAISED ARE SUBSTANTIAL

Preliminary Discussion

Article III, Section 3 of the ordinance permits churches in the residential area of the borough. [R. 47] Section 3 (8) of Article III calls for off-street parking area for churches, schools and other places of assembly of 300 square feet for every five seats. [R. 48] It then adds that no permit for a church, school or other place of assembly will be granted unless one-quarter mile away from an existing church, school or other assembly place. [R. 48]

The building plans originally submitted showed a designated parking space for 13 cars to be parked in front of the church. [R. 101-102] The plans showed space for parking 13 cars to the rear of the church. [R. 102] The plans showed space for parking 6 cars on each side. [R. 102] This makes a total of 38 cars that could be parked on the premises. This was on the basis of 148 square feet for each car instead of the 300 square feet called for by the ordinance. But even under the ordinance a total of 19 cars could be parked on the premises. This would accommodate a seating capacity of 95 or 10 above the maximum capacity of the small church of 85 persons.

Undisputed evidence showed a full compliance with Section 3 (8) of the ordinance. [R. 92-93, 102] The finding by the trial court [R. 22-23] concurred in by the Superior Court, that appellants failed to comply with the off-street parking provisions of the ordinance is arbitrary and capricious and wholly unsupported by the record. [R. 92-93, 102] The Board of Adjustment did not contend that appellants

failed to comply with the off-street parking provisions. [R. 22] It denied the permit only because of the one-quarter-mile limitation. [R. 22, 138-144] The board found substantial compliance with the ordinance in finding number 9. [R. 139] Even though appellees erroneously argued that the 300-square-foot provision was not fully complied with, the Board of Adjustment had the power under Article IX, Section 4 of the ordinance [R. 49] and did grant a variance from that requirement by finding adequate parking arrangements. Since no appeal was taken, as required under the law, by any aggrieved party from the granting of the variance on adequate parking facilities, the question of parking was never properly before any of the appellate courts.

Since the trial court and appellate courts have affirmed the denial of the permit on the constitutionality of the off-street parking provision, it must be considered upon this appeal even though it was complied with by appellants.

Discussion of Questions

I.

Where appellants applied for a permit to build and use a church in the Borough of Bethel under the above ordinance which was denied because (1) there were other places of assembly within a distance of one-quarter mile from the property, (2) there was not adequate compliance with the off-street parking requirements of the ordinance, (3) creation of traffic congestion in the area, and (4) protests of residents against the church, do Sections 3 (8) and 3 (9) of Article III of the ordinance, as thus construed and applied, abridge appellants' right to freedom of religion and assembly contrary to the First and Fourteenth Amendments to the Constitution of the United States guaranteeing such rights?

There is a direct conflict of decisions between the Pennsylvania courts and the Supreme Court of Indiana on the validity of the off-street parking provisions of the ordinance. The opinion of the Superior Court adopted the

dissenting opinion in *Board of Zoning Appeals* v. *Decatur, Indiana Company of Jehovah's Witnesses*, 233 Ind. 83, 117 N. E. 2d 115 (1954). The court below reached a contrary opinion to that of the Indiana Supreme Court, which held the off-street parking requirement unconstitutional. See Appendix A, *infra*, at page 32. This conflict in decisions on this question between the court below and the Supreme Court of Indiana is grounds for noting probable jurisdiction in this case.—*Pennsylvania* ex rel. *Sullivan* v. *Ashe*, 302 U. S. 51, 52 (1937).

While it is no ground for jurisdiction, it is interesting to note that the holding below on failure to comply with the off-street parking provision is in conflict with a case decided by the Supreme Court of Florida where, on similar facts, it was held that there was a substantial compliance. —*State* ex rel. *Tampa, Florida Company of Jehovah's Witnesses* v. *City of Tampa*, 48 S. 2d 78 (1950). Compare *State of Washington* ex rel. *Wenatchee Congregation of Jehovah's Witnesses* v. *City of Wenatchee*, decided by the Supreme Court of Washington, June 6, 1957, 312 P. 2d 195.

The decision below is out of accord with *Cantwell* v. *Connecticut*, 310 U. S. 296 (1940); and *Murdock* v. *Pennsylvania*, 319 U. S. 105 (1943), which hold that ordinances that abridge freedom of religion, as construed and applied, are unconstitutional. Both sections 3 (8) and 3 (9) of Article III are restrictions and burdens upon the exercise of freedom of religion guaranteed by the First and Fourteenth Amendments. (*Board of Zoning Appeals* v. *Decatur Congregation of Jehovah's Witnesses*, 233 Ind. 83, 117 N. E. 2d 115 (1954); Compare *State of Washington* ex rel. *Wenatchee Congregation of Jehovah's Witnesses* v. *City of Wenatchee*, 312 P. 2d 195 (decided by the Supreme Court of Washington, June 6, 1957)) This is a very substantial question that ought to be decided by this Court.

Off-street-parking requirements, when strictly enforced in a thickly populated county (like Allegheny County, Pennsylvania, where the Borough of Bethel is on the outskirts

of Pittsburgh, one of the largest cities of the country), amount to practically an outright prohibition of new churches in a community. In effect it is an exclusion of churches in most cities and towns. The average size city church of the large denominations seats from 300 to 500 people. This means that the average church preparing to build a new edifice in a new location would have to have available between one-half acre and two acres contigious to the church building. The mere stating of this shows how impossible it is to comply with, which shows what an unreasonable burden it is upon freedom of religion.

The usual church is not wealthy enough to operate a city parking lot for its congregants. The average city or town in the United States does not have that much vacant property located in their populated areas that is available for purchase and use as a church parking lot. This exclusion by impossibility of compliance is a prohibition of freedom of religion. It is obviously unconstitutional. (*Jamison* v. *Texas*, 318 U. S. 413 (1943)) A similar enforcement of a zoning law was held void and unconstitutional in *Mooney* v. *Village of Orchard Lake*, 333 Mich. 389, 53 N. W. 2d 308 (1952).

The one-quarter-mile limit in the ordinance is equally prohibitory and also impossible of being obeyed. So burdensome is it, even in the Borough of Bethel, that the administrators of the law do not enforce compliance with it by all other churches. Read the enlightening dissenting opinion of a member of the Board of Adjustment in this case. [R. 145] The Borough of Bethel is large in area. While it is a large portion of the county it is in a densely populated area, the largest industrial community of this country. With the limits of the municipality being so expansive yet built-up, the area of the borough being as small as it is, it is impossible to have many churches one-quarter mile apart. It means that a monopoly is granted to the first few churches that locate there. But in practical effect it is prohibitory of all others of the more than 261 different religious groups in the United

States. The borough, under this prohibition, cannot possibly accommodate more than ten of all these religions, the remainder being prohibited in the built-up area of the borough.

The implications arising out of the quarter-mile exclusion are more vicious in their nature than those that arise out of the actual prohibition of churches. The quarter-mile exclusion means that any group (church, stadium, school or other place of assembly) may by certain strategic erections, intentionally or unwittingly, prohibit a religious group from ever erecting its church in any selected choice area. The only corrective measure to prevent this result would be for the body administering the zoning ordinance to allocate the building permits to a fair representation of the various religious groups. This allocation of permits to a cross section of denominations would represent police state tactics in their most reprehensible form.

The one-quarter-mile limitation is geographical and applies in any direction regardless of the type of area and is not confined to heavily traveled streets. It does not attempt to regulate the spacing between churches and places of assembly on any street, which is not admitted to be valid. The restriction has only a very remote and speculative relationship to traffic congestion. The relation claimed is unreal and, as applied, turns out to be a mere prohibition of a right guaranteed by the First Amendment. That the quarter-mile limitation can bear no possible relationship to safety, etc., is best illustrated by the fact that under the ordinance a stadium seating one hundred thousand persons would be permitted in the worst conceivable traffic intersectional area so long as the structure is built within the one-quarter-mile limitation, while a small church having a capacity of only forty persons would be prohibited if it should fall a few feet within the quarter-mile area. The quarter-mile limitation, therefore, in no way restricts itself to the evil with which it is said to deal, but rather strikes down with it the right to freedom of worship.

Furthermore, the traffic-congestion argument advanced in support of the ordinance is without any support in the ordinance. Nowhere does the ordinance speak of traffic, and nowhere does the quarter-mile limitation apply only if the traffic is heavy. On the contrary, the quarter-mile limitation is an absolute criterion in itself without accompanying limitations. The traffic congestion argument used by the courts below in support of the constitutionality of the ordinance are legally irrelevant under the terms of the ordinance. They are pure rationalizations to support an insupportable position.

Traffic control has no relation to zoning, according to some courts. Increase in traffic congestion by a permissive use is also said not to be a factor in zoning, which is concerned only with the classification of the use property may be put to. (*City of Syracuse* v. *Bronner*, 133 N. Y. S. 2d 153, 163 (1953 S. Ct.); *Greenburg* v. *City of New Rochelle*, 129 N. Y. S. 2d 691, 696 (1954 S. Ct.); *Property Owners Ass'n of Garden City Estate, Inc.* v. *Board of Zoning Appeals of Incorporated Village of Garden City*, 123 N. Y. S. 2d 716, 718, 2 Misc. 2d 309, 311 (N. Y. S. Ct. 1953); *Huntley Estates, Inc.* v. *Town of Eastchester*, 121 N. Y. S. 2d 504, 508 (S. Ct. 1953)) By force of the same reason the light and indirect relationship of this ordinance to traffic control in the borough is not sufficient to justify the heavy and direct abridgment of freedom of worship guaranteed by the Constitution.

An unanswerable reply to the contention that both provisions of the ordinance have any reasonable relationship to traffic congestion is that there are other more conventional and direct means of controlling traffic than (1) making all churches operate parking lots for their members and (2) restricting the total number of churches in the borough to an unreasonably small number. The answer is simple and apparent. It is in the record. One of the witnesses against appellants admitted that the use of conventional traffic controls, such as a policeman, a "slow" sign or a

stop light would be superior in the control of traffic in the area to the barring of a church on this property. [R. 128] The borough has not taken any of these direct and conventional steps to control traffic. [R. 67, 68, 127-128, 135] Nor did the Board of Adjustment require the reasonable alternative of making the lightly traveled Crest Way in the rear of the property the entrance to the property in lieu of the more heavily traveled Fort Couch and Bethel Church Roads fronting the property. The board was authorized to exercise this alternative under the powers vested in the board under the ordinance (see R. 49). It has chosen the indirect methods of the prohibition and limitation of the number of places of assembly which have no reasonable relationship to traffic control sufficient to overcome the strong provisions of the First Amendment.

The Supreme Court of Florida held that the failure to take these direct and conventional traffic control measures by the City of Tampa compelled the rejection of the argument that a church must strictly and fully comply with the off-street parking ordinance. The court held that a partial compliance was enough to support a mandamus action to compel the issuance of the building permit for a church. —*State* ex rel. *Tampa, Florida Company of Jehovah's Witnesses* v. *City of Tampa*, 48 S. 2d 78 (1950).

This brings this Court to a consideration of the basic error in the approach taken by the courts below in disposing of the federal constitutional question here discussed. These courts treated the question as though all that was involved was the due process clause and the protection of property under it. They failed completely to consider and weigh the heavier provisions of the First Amendment against (1) the measures employed in the ordinance, (2) their remote relationship to traffic and (3) their failure to resort to more direct and conventional police traffic control devices or alternative entrances to the property. This omission in the judicial function performed by the courts below, which is compelled by federal constitutional practice, produced the

error here complained of. This erroneous exercise of the judicial function is out of harmony with *Schneider* v. *New Jersey*, 308 U. S. 147, 161-162 (1939). That case prohibits such severe measures taken against fundamental liberty that have only a remote relationship to the evil to be dealt with. It also holds that the constitutional right outweighs such speculative advantages to municipal convenience.

The church building is as necessary to the pulpit preacher in the exercise of freedom of worship for himself and his congregation of listeners as is the religious pamphlet to the street evangelist or the door-to-door missionary. Freedom of religion guarantees the right to use literature as a part of preaching. (*Cantwell* v. *Connecticut*, 310 U. S. 296 (1940); *Murdock* v. *Pennsylvania*, 319 U. S. 105 (1943); *Follett* v. *Town of McCormick*, 321 U. S. 573 (1944).) It also guarantees the right to use a public park as a pulpit. (*Niemotko* v. *Maryland*, 340 U. S. 268 (1951); *Kunz* v. *New York*, 340 U. S. 290 (1951)) By force of the same reason the First Amendment guarantees the right to have a privately-owned church pulpit and place of assembly for worship.

Without a place to assemble there cannot be religious worship. Without owning real estate and the right to build or have a church building there can be no place of assembly for worship. The use of real estate and the right to build a church on it are necessary ancillaries to freedom of worship. They cannot be abridged except for reasons that are strong and sufficiently compelling, as in the distribution of religious literature cases. (*Lovell* v. *City of Griffin*, 303 U. S. 444 (1938); *Schneider* v. *New Jersey*, 308 U. S. 147 (1939); *Cantwell* v. *Connecticut*, 310 U. S. 296 (1940); *Murdock* v. *Pennsylvania*, 319 U. S. 105 (1943); *Follett* v. *Town of McCormick*, 321 U. S. 573 (1944); *Kunz* v. *New York*, 340 U. S. 290 (1951); compare *Chaplinsky* v. *New Hampshire*, 315 U. S. 568 (1942), with *Taylor* v. *Mississippi*, 319 U. S. 583 (1943).) No such reasons exist in this case.

The trial court relied upon the presumption of constitutionality. [R. 26] This does not apply in the First Amendment cases where no attack is made against the face of the ordinance but the contention is that it is unconstitutional as applied. (*United States* v. *Carolene Products Co.*, 304 U. S. 144, 152 (1938); *Thomas* v. *Collins*, 323 U. S. 516, 531 (1945); *Busey* v. *District of Columbia*, 128 F. 2d 592, 595-596 (D. C. Cir. 1943)). The rule of denying presumption of constitutionality is also applied in cases involving zoning ordinances. (In re *Porterfield*, 28 Cal. 2d 91, 168 P. 2d 706 (1946); *Roman Catholic Welfare Corp.* v. *City of Piedmont*, 45 Cal. 2d 325, 333, 289 P. 2d. 438 (1955); *Synod of Ohio of United Lutheran Church* v. *Joseph*, 139 Ohio St. 229, 246-247, 39 N. E. 2d 515 (1942)) The burden is upon the municipality in zoning law cases to prove the justification of abridgment of constitutional rights. (*Applestein* v. *Mayor and City Council of Baltimore*, 159 Md. 39, 47, 143 A. 666 (1930); *Synod of Ohio of United Lutheran Church* v. *Joseph*, 139 Ohio St. 229, 246-249 (1942)) By affirmance the Superior Court also followed the same error in this case as was committed by the trial court.

Both the trial court and the appellate court in this case gave consideration to speculative and remote arguments so as to sustain the ordinance as a traffic measure. [R. 20-28, 40-44] The arguments are also irrelevant since nowhere does the ordinance make traffic congestion a relevant factor in determining the application of the quarter-mile limitation. The quarter-mile limitation is an absolute criterion in itself. See Appendix A, *infra*, at pages 28, 35 for the Superior Court's ruling. This method of consideration of cases involving the First Amendment has been expressly condemned by this Court. In the many cases decided this Court has laid down the principle to be followed which was ignored by the courts below in this case.

Those courts instead applied the rules applicable to commercial uses prohibited by zoning laws under the due process clause of the Fourteenth Amendment insofar as

it relates only to property. They failed to follow the mandate of this Court in cases under the First Amendment and the Fourteenth Amendment in the following cases: *West Virginia State Board of Education* v. *Barnette*, 319 U. S. 624, 639 (1943); *Schneider* v. *New Jersey*, 308 U. S. 147, 161 (1939); *Thornhill* v. *Alabama*, 310 U. S. 88, 95-96 (1940); *Martin* v. *City of Struthers*, 319 U. S. 141, 151-152 (1943); *Murdock* v. *Pennsylvania*, 319 U. S. 105, 115 (1943); *Follett* v. *Town of McCormick*, 321 U. S. 573, 575; *Kovacs* v. *Cooper*, 336 U. S. 77, 88 (1949); *Terminiello* v. *City of Chicago*, 337 U. S. 1, 4 (1949). See also *Pittsford* v. *City of Los Angeles*, 50 Cal. App. 2d 25, 32, 122 P. 2d 535 (1942); In re *Mares*, 75 Cal. App. 2d 798, 171 P. 2d 762, 806 (1946). Had the courts below followed the rule stated in the above cases, which is applicable in this case, the speculative and remote considerations and justifications not based upon the ordinance and relied upon for sustaining the ordinance would have been rejected.

The departure taken by the court below from the above-stated cases decided by this Court is grounds for taking this case in for decision. Also the approval as valid under the federal Constitution of an ordinance that, under the guise of regulation, in its operation prohibits the exercise of freedom of worship by barring all new churches from the entire borough, is of such broad national interest and of such great public importance that it alone calls for the exercise of this Court's jurisdiction to decide this case.

The case of *Corporation of Presiding Bishop* v. *City of Porterville*, 90 Cal. App. 2d 656, 203 P. 2d 823 (1949), appeal dismissed 338 U. S. 805 (1949) (commented upon in *American Communications Association* v. *Douds*, 339 U. S. 382, 397-398 (1950)) is not in point. The case did not involve an entire municipality, as here, but the ordinance operated upon only a small portion of the city and prohibited churches in only one small residential area of the city. The case here is like *Mooney* v. *Village of Orchard Lake*, 333 Mich. 389, 53 N. W. 2d 308 (1952). Compare *Roman*

Catholic Welfare Corp. v. *City of Piedmont*, 45 Cal. 2d 325, 289 P. 2d 438 (1955). See also 70 Harv. L. Rev. 1428; 44 Cal. L. Rev. 775, 777, 3 U. C. L. A. L. Rev. 387, 391; 27 St. Johns L. Rev. 93; 55 Mich. L. Rev. 601, 602; 23 Brooklyn L. Rev. 185; 53 W. Va. L. Rev. 301; and 3 St. Louis U. L. Jour. 265.

The reasons relied upon to sustain the validity of the enforcement of the ordinance by the courts below have (in other cases almost identical to this one) been rejected. See *Diocese of Rochester* v. *Planning Board of Town of Brighton*, 1 N. Y. 2d 508, 135 N. E. 2d 827 (1956); *Community Synagogue* v. *Bates*, 1 N. Y. 2d 445, 136 N. E. 2d 488 (1956); *State of Washington* ex rel. *Wenatchee Congregation of Jehovah's Witnesses* v. *City of Wenatchee*, 312 P. 2d 195 (decided by the Supreme Court of Washington, June 6, 1957); *State* ex rel. *Tampa, Florida Company of Jehovah's Witnesses* v. *City of Tampa*, 48 S. 2d 78, 79-80 (1950); *Board of Zoning Appeals* v. *Decatur, Indiana Company of Jehovah's Witnesses*, 233 Ind. 83, 117 N. E. 2d 115 (1954); *Congregation Committee, Jehovah's Witnesses* v. *City Council*, 287 S. W. 2d 700 (Tex. Civ. App. 1956); *City of Sherman* v. *Simms*, 143 Tex. 115, 183 S. W. 2d 415 (1944); *Village of University Heights* v. *Cleveland Jewish Orphans' Home*, 20 F. 2d 743 (6th Cir. 1927) (cert. denied 275 U. S. 569 (1927)); *Women's Kansas City St. Andrew Soc.* v. *Kansas City*, 58 F. 2d 593 (8th Cir. 1932).[4] These cases are all applicable. They irrefutably establish the substantiality of the question here discussed.

It is submitted that this question is substantial and of sufficiently wide public importance to warrant the noting of jurisdiction and hearing full argument herein to resolve the question.

[4] Compare *Seattle Title Trust Co.* v. *Roberge*, 278 U. S. 116 (1928), involving a local zoning ordinance held invalid.

II.

Where the proof showed that permits to build other churches had been granted under the ordinance without compliance with the off-street parking and the one-quarter-mile limitations but, under the same conditions and circumstances, the administrators of the ordinance refused appellants a permit to build a church, are Sections 3 (8) and 3 (9) of Article III of the ordinance, as thus construed and applied, a denial of appellants' constitutional rights of freedom of religion and assembly contrary to the equal protection clause of the Fourteenth Amendment?

The Presbyterian Church, which also provides for off-street parking, is located within this one-quarter-mile area. [R. 69] There are other churches in the same neighborhood. [R. 94, 100, 116] The Board of Adjustment found that the appellants' church complied with the ordinance except as to the one-quarter-mile limitation. [R. 138-139] Read also the opinion of the dissenting member of the Board. [R. 145] He stated that there "have been many public places constructed since the passage of the ordinance and they have never been denied their right to build." Before that he said that practically "no other public place in the Borough of Bethel complies with the terms of the ordinance." [R. 146]

Appellants in the trial court, pursuant to proper practice in such *de novo* hearings, offered proof as to the particularity of permits granted to other churches without compliance with the ordinance. [R. 17-19] A full exception was allowed to the order excluding the testimony on the ground that it was not material. [R. 19-20]

The Superior Court affirmed this exclusion in these words: "Evidence of other variances is clearly inadmissible." In the paragraph preceding the above quotation the court approved a quotation "that permitting some persons to violate a zoning regulation does not preclude enforcement against another." See Appendix A, *infra*, page 28.

Here you have it. A clear case of approval of the highest

court of the state in this case of admitted discrimination in the enforcement of the ordinance. This is approved on the sole ground that it is a violation of the law. But granting a permit to another person to use his property in variance to the zoning law is not a violation. It is permitted by Article IX Section 4 (3) of the zoning law itself. [R. 49] Besides using property as a church is guaranteed by the Constitution and allowed by the ordinance. It is entirely wrong to characterize it as a "violation of the law." Two crimes do not make a right. But that is not the situation here.

It is the granting of the special use permit under the "variance" provision in the case of all other churches and denying it in this case that constitutes the violation of the equal protection clause in this case.

The rights of appellants guaranteed by the First and Fourteenth Amendments have been denied contrary to the equal protection clause. (*Fowler* v. *Rhode-Island*, 345 U. S. 67 (1953); *Niemotko* v. *Maryland*, 340 U. S. 268 (1951); *Skinner* v. *Oklahoma*, 316 U. S. 535 (1942); *Yick Wo* v. *Hopkins*, 118 U. S. 356 (1886)) In point are *Danskin* v. *San Diego Unified School District*, 28 Cal. 2d 536, 545, 171 P. 2d 885 (1946); and *People* v. *Amdur*, 123 Cal. App. 2d Supp. 951, 972, 267 P. 2d 445, 460 (1954). Directly on the nose are *Roman Catholic Welfare Corp.* v. *City of Piedmont*, 45 Cal. 2d 325, 289 P. 2d 438 (1955); and *Underhill* v. *Board of Appeals of Town of Oyster Bay*, 273 App. Div. 788, 75 N. Y. S. 2d 327, 328 (1947) (affirmed 297 N. Y. 937, 80 N. E. 2d 342). Compare *McConkey* v. *City of Fredericksburg*, 179 Va. 556, 19 S. E. 2d 682 (1942), where the court summed up the case thus: "The probable explanation of this discrimination is that someone, not unfriendly to the Salvation Army, is no friend to Jehovah's Witnesses."

The decisions of the courts below are out of harmony with the above-cited decisions by this Court and are in direct conflict with state court decisions on the same issue of denial of equal protection of the laws. The applicability of such decisions cannot be questioned and they all call for an ex-

ercise of this Court's power of supervision to halt the departure therefrom by the court below. To this end this Court, on this question alone, ought to note jurisdiction, set the case down for argument and resolve the question.

CONCLUSION

For the reasons above stated this Court should conclude that the questions involved are substantial and of wide public importance so as to warrant the noting of jurisdiction, which should be done by this Court. Then the case should be set down for hearing and the questions resolved in due course of time and procedure.

Respectfully submitted,

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August, 1957.

APPENDIX A

Opinion of Superior Court of Pennsylvania

No. 124

In Re: Appeal of Trustees of the Congregation of Jehovah's Witnesses, Bethel Unit, from the Decision of the Board of Adjustment of the Borough of Bethel, Allegheny County, Pennsylvania	In the Superior Court of Pennsylvania
Appeal of Prentiss P. Swift, J. A. Beck and Raymond Comodor, Trustees of the Congregation of Jehovah's Witnesses, Bethel Unit	No. 125 April Term, 1956.

Appeal from the Order of the County Court of Allegheny County at No. A867 of 1955

Opinion by Ervin, J. Filed: March 20, 1957

This case is here on a writ of certiorari directed to the Allegheny County Court. That court affirmed a decision of a board of adjustment in which the grant of a variance from the provisions of a borough zoning ordinance was refused.

The R-1 residential district, in which appellant's property is located, expressly permits the following: "Uses—One-family dwelling; Church; Public or Parochial School (certified by State Board of Education). . . ." It provides: "(8) Off-Street Parking—Church, school, auditorium, stadium, and similar places of assembly, one car space (300 sq. ft.) for every 5 seats or fraction thereof.

"(9) None of the uses listed in Item 8 above shall be permitted within ¼ mile of each other."

The Board of Adjustment and the lower court found, on adequate evidence, that the appellants' proposal violates the ¼ mile requirement in that the proposed location is 877 feet from the nearest place of assembly and that it violates the off-street parking requirements in that 17 parking spaces are required under the ordinance and only 13 spaces will be provided.

Our review is as on certiorari in its broadest sense and we examine the record to see whether there is evidence to sustain the court's findings and whether the proceeding is free from a violation of law and any manifest abuse of discretion. This is so whether or not testimony on the issue was taken in the court below. The scope of our inquiry is determined by the breadth of the certiorari issued by this Court and not by the power exercised by the court below. *Landau Advertising Co., Inc. v. Zoning Board of Adjustment*, 387 Pa. 552; 128 A. 2d 559; *Schaub Appeal*, 180 Pa. Superior Ct. 105, 118 A. 2d 292.

The Board of Adjustment and the court below found that appellants' land is located at the intersection of Bethel Church Road and Fort Couch Road, which intersection is heavily traveled and is further complicated by the presence of traffic islands in the intersection; that the erection of appellants' church at this intersection would substantially increase traffic dangers and congestion; that appellants' land is no different from other land in the area and presents no unique or unusual feature peculiar to it as distinguished from other land in the area; that the zoning ordinance was in effect at the time appellants purchased the land here involved. Appellants concede that traffic regulation is a proper exercise of police powers but they argue that these powers may not be exercised against a church.

In *Schaub Appeal*, supra, at page 113, we pointed out that "The Enabling Act also provides: 'Such regulations shall be made in accordance with a comprehensive plan, and designed to lessen congestion in the streets, to secure safety from fire panic and other dangers . . . to facilitate

the adequate provision of transportation. . . .' Act of May 4, 1927, P.L. 519, art. XXXIII, § 3303, added 1947, July 10, P.L. 1621, § 93, 53 P.S. § 15211.3." Our Supreme Court, in *McSorley* v. *Fitzgerald et al.*, 359 Pa. 264, 269, 270, 59 A. 2d 142, passed upon the validity of a regulation which protects against the dangers of traffic congestion in the following language: "Those attacking the constitutionality of such a law as that which is here under consideration obviously labor under the mistaken notion that its purpose is merely to cater to the convenience of the owners and operators of motor vehicles; on the contrary its effect may be to interfere with the perhaps greater convenience of parking on the public streets; its real purpose is to promote the larger and more general good of the community by freeing the streets of the impediments and perils arising from dangerous and often intolerable conditions of traffic congestion. And since the Act is concerned with the regulation of the transportation of persons and property along the highways of the municipality, and since the evils it seeks to remedy vitally affect conditions for the transaction of business, the prevention of accidents, the affective operations of fire and police forces, and, in general, the enjoyment of many phases of city life and activities, its justification stems directly from the exercise of the police power, which is the supreme power of government." To the same effect see *Vine* v. *Board of Adjustment of Village of Ridgewood*, 136 N.J.L. 416, 56 A. 2d 122; *O'Brien* v. *City of Chicago*, 347 Ill. App. 45, 105 N.E. 2d 917; McQuillan, Municipal Corporations, Vol. 8, § 25.132; Yokeley, Zoning Law, 2d Ed., § 212.

The zoning ordinance here involved does not prohibit churches from R-1 residential districts. On the contrary, it expressly permits churches in such districts subject to the above mentioned restrictions. A number of cases have been cited by the appellants from other jurisdictions declaring as unreasonable and arbitrary zoning ordinances which expressly prohibit churches from residential districts. If we had such an ordinance in this case we would give great con-

sideration to the question of striking it down as unreasonable and arbitrary. We are here concerned, however, with an ordinance which imposes certain conditions with respect to the site upon which a church may be erected. Our present problem is to determine whether these regulations or conditions bear a rational relation to the public health, safety, morals or general welfare and are not unjustly discriminatory or arbitrary or unreasonable or confiscatory in their application to a particular or specific piece of poperty. *White's Appeal*, 287 Pa. 259, 134 A. 409; *Lord Appeal*, 368 Pa. 121, 125, 126, 81 A. 2d 533.

The grouping of a number of public assembly buildings in a residential district would obviously create additional traffic hazards. The fire protection facilities of single family residential districts are usually designed to handle the fire fighting problems presented by residences with few inhabitants. They are not normally designed to handle buildings occupied by large numbers of people. Street and traffic control facilities of a residential district are not normally prepared to handle the large concentration of people or automobiles which results from public assembly use. It is reasonable to suppose that several public assembly structures located closely together would create an additional threat to the safety of their occupants and the traveling public. Proximity requirements are designed for the purpose of lowering the hazards which can arise from the close grouping of assembly buildings or structures which are exceptional in a residential district. We are of the opinion that there was ample evidence to justify the findings below to the effect that both regulations here involved bear a reasonable relation to the safety of the public. The evidence shows that the intersection, where appellants propose to locate their church building, is on a traffic route connecting two major arterial routes, U. S. 19 and State 88. It also constitutes a connection between the county system of belt routes. Motor vehicle traffic, largely trucks, is heavy, especially on weekends. In addition to passenger cars, large trucks hauling

freight, steel, chemicals and gasoline pass through this intersection. The vehicles leaving appellants' lot would enter the intersection opposite the islands located in its middle. An automobile leaving the lot would enter on that portion of the road which is made by the island into a one-way lane northward; thus, if such an automobile were to proceed southward on Bethel Church Road, it would have to enter the one-way lane northward and go far enough to make a U-turn and then re-enter the highway and come back through the intersection in question. The double island and the three-way intersection at appellants' site and the additional automobiles of appellants' congregation would certainly further complicate and increase the traffic hazard already existing at this point.

Certainly freedom of worship does not mean that churches are exempt from reasonable police power regulations. Our Supreme Court in *Kurman et al.* v. *Phila. Zoning Board*, 351 Pa. 247, 40 A. 2d 381, determined that setback requirements are applicable to properties used for church purposes. The concepts of religious freedom, freedom of speech and the press which are embodied in the First Amendment have never been construed as absolute rights and beyond the power of reasonable regulation under the police power. *Board of Zoning Appeals of Decatur v. Decatur, Ind. Co. of Jehovah's Witnesses*, 117 N.E. 2d 115, 123. The language used at page 123 is applicable to the present case: "It is quite evident that the members of the appellee could be killed just as dead going to and from church as going to and from a theater or a basketball game. It is a proper exercise of the police power to protect appellee's members from their own negligence as well as from the negligence of the traveling public. There would be just as much logic in holding that the members of appellee when going to church were not required to comply with the traffic regulations as in holding that the appellee is not required to make reasonable provisions for a lessening of the traffic hazards by off-street parking.

"If it was a proper exercise of the police power for the city by its zoning ordinance to require the appellee to comply with the average setback line of the residences, which only has a very remote bearing on traffic hazards, a fortiori it was a reasonable exercise of the police power to require appellee to provide space for 25 cars to park off the streets. The right of appellee to exercise its religious freedom is not violated in either case."

In *American Communication Association v. Douds*, 339 U. S. 382, 397, Chief Justice VINSON states: "When the effect of a statute or ordinance upon the exercise of First Amendment freedoms is relatively small and the public interest to be protected is substantial, it is obvious that a rigid test requiring a showing of imminent danger to the security of the Nation is an absurdity. We recently dismissed for want of substantiality an appeal in which a church group contended that its First Amendment rights were violated by a municipal zoning ordinance preventing the building of churches in certain residential areas. *Corporation of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints* v. *Porterville*, 1949, 338 U. S. 805, 70 S. Ct. 78."

If the validity of the legislation classification for zoning purposes be fairly debatable, the legislative judgment must be allowed to control. *Euclid v. Ambler Realty Co.*, 272 U. S. 365, 388. To the same effect see *Bell Tel. Co. of Pa.'s Appeal*, 138 Pa. Superior Ct. 527, 531, 10 A. 2d 817.

There is not one word in the record to form the slightest basis for the intimation in appellants' oral and written argument that the appellees "do not like Jehovah's Witnesses" or their "religious practices." The appellees do not object to the placing of a church in the residential district on a lot which complies with the conditions of the ordinance. It has not been suggested that the appellants be relegated to a commercial district or another municipality. There is no basis for charging the board with discrimination. Appellants argue that inasmuch as "there are churches in the very

same neighborhood that have been permitted to operate within the quarter-mile area without objection" the denial of this permit constitutes discrimination and deprivation of rights contrary to the equal protection clause of the 14th Amendment.

The only evidence of another church located within ¼ mile of a similar building is the St. Thomas More Roman Catholic Church. The evidence further showed this to be a temporary structure which never came before the board of adjustment. If other public assembly buildings exist contrary to the terms of the ordinance they are, as said by Judge BROWN of the court below, either violations or variances (if not pre-existing non-conforming uses).

"It has been held quite uniformly that permitting some persons to violate a zoning regulation does not preclude enforcement against another. . . . The circumstances in each case might well have been substantially different." *Hasley's Appeal*, 151 Pa. Superior Ct. 192, 193, 194, 30 A. 2d 487; *Valicenti's Appeal*, 298 Pa. 276, 284, 148 A. 308.

Evidence of other variances is clearly inadmissible. *Ventresca v. Exley*, 358 Pa. 98, 102, 56 A. 2d 210.

The appellants will not be subjected to any particular hardship because the evidence shows that they could obtain another location in a residential area on the same road as appellants' property and about 2000 feet therefrom which would not violate the above mentioned conditions. Their argument that a strict enforcement of the restrictions might prohibit appellants from having a church in the borough does not seem to be in accord with the facts as developed by the evidence. The appellants knew or ought to have known of the conditions applicable to their property at and prior to the time of its purchase. In *Catholic Cemeteries Assn. Zoning Case*, 379 Pa. 516, 522, 109 A. 2d 537, it was said: "The assertion of the court below that 'a literal enforcement of the provisions of the ordinance would here result in unnecessary hardship' is substantiated by only two other statements found in its opinion. The court declared 'it would

probably be impossible to find a suitable tract of land within any reasonable distance of built-up areas that would not be in more or less proximity to residential properties', and . . . '[the owners] in the case at bar are being completely deprived of the right to sell—as to the owners—and being completely deprived, as to the corporation, of their right to dedicate, maintain and use at least an equally important use, to wit, a religious use of burial grounds.' Neither of these reasons is sufficient to support the claim of hardship. That it may *probably* be impossible to find another suitable tract is not the necessary hardship envisioned by the Act."

In *Michener Appeal*, 382 Pa. 401, 406, 115 A. 2d 367, Chief Justice STERN said: "The law is well established that a variance may be granted only where a property is subjected to a hardship unique or peculiar to itself as distinguished from one arising from the impact of the zoning regulations on the entire district." See also *Schaub Appeal*, supra.

The appellants' lot does not possess any unique or unusual characteristics which would make it unusable for residential use.

We have examined this record and find that there is evidence to sustain the lower court's findings and we can find no violation of law or any manifest abuse of discretion.

Order affirmed.

APPENDIX B

(The printed Record filed in the Superior Court of Pennsylvania accompanies this Statement as to Jurisdiction.)

APPENDIX C

JUDGMENT

IN THE SUPERIOR COURT OF PENNSYLVANIA

Sitting at Pittsburgh

In Re: Appeal of Trustees of the Congregation of Jehovah's Witnesses, Bethel Unit, from the Decision of the Board of Adjustment of the Borough of Bethel, Allegheny County, Pennsylvania Appeal of PRENTISS P. SWIFT, J. A. BECK and RAYMOND COMODOR, Trustees of the Congregation of Jehovah's Witnesses, Bethel Unit	No. 125 April Term, 1956.

Appeal from the order of the County Court of Allegheny County at No. A 876 of 1955.

DECISION

March 20, 1957

Order affirmed.

ERVIN, J.

APPENDIX D

Docket Entries

In the Superior Court of Pennsylvania

Sitting at Pittsburgh

In Re: Appeal of Trustees of the Congregation of Jehovah's Witnesses, Bethel Unit, from the Decision of the Board of Adjustment of the Borough of Bethel, Allegheny County, Pennsylvania

Appeal of Prentiss P. Swift, J. A. Beck and Raymond Comodor, Trustees of the Congregation of Jehovah's Witnesses, Bethel Unit

No. 125 April Term, 1956.

Appeal from the order of the County Court of Allegheny County at No. A 876 of 1955.

March 21, 1956, Appeal and affidavit filed and writ exit, returnable second Monday of November, 1956.

March 27, 1956, Notice of appeal, filed.

November 2, 1956, Record and Testimony, filed.

November 16, 1956, Argued

DECISION

March 20, 1957

Order affirmed.

Ervin, J.

April 1, 1957, REMITTED

April 23, 1957, Petition for allowance of appeal filed at No. 212 A Misc. Dkt.

APPENDIX E

Docket Entries

In the Supreme Court of Pennsylvania

Western District

In Re: Appeal of Trustees of the Congregation of Jehovah's Witnesses, Bethel Unit, from the Decision of the Board of Adjustment of the Borough of Bethel, Allegheny County, Pennsylvania	No. 2121A Miscellaneous Docket

April 23, 1957, Petition of Prentiss P. Swift, J. A. Beck and Raymond Comodor, Trustees of the Congregation of Jehovah's Witnesses, Bethel Unit, for the allowance of an appeal from the judgment of the SUPERIOR Court at No. 125 April Term, 1956, filed.

April 23, 1957, Acceptance of service, filed.

April 29, 1957, Answer filed.

ORDER

May 28, 1957

Petition refused.

Per Curiam